REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

Misc Appli 425 of 2004

NYAKUNDI & COMPANY ADVOCATES…….APPLICANT

VERSUS

KENYATTA NATIONAL HOSPITAL BOARD…....RESPONDENT

RULING

By its Chamber Summons of the 8/12/2004 the Applicant seeks an order that this court do review or set aside the Deputy Registrar's ruling on the Advocates Bill of Costs of the 8th July 2004 on the grounds set out therein and Supporting Affidavit of Bernard Mwaura the advocate for Applicant.

The Bill of Costs the subject matter of the Application was an Advocate and Client Bill of the Respondents who has ceased acting for the Applicant.

The particular item which the Applicant objects to is the instruction fee allowed by the Taxing Officer in the sum of Kshs 4 Million which due to the fact that the bill was an Advocate and Client bill was increased to Kshs 6 Million in accordance with Schedule VII B of the Advocates Remuneration Rules (the Rules)

Rules 11(1) and (2) of the Rules states as follows:

> 11 (1) Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

I will return to the procedure in this case and jurisdiction of the court.

Mr. Wandabwa submitted that the learned Taxing Officer had misdirected herself in principle and that in any event the amount awarded was manifestly excessive. Also she had confused the value of the subject matter with the sums alleged to have been stolen by the Plaintiff.

Further no reason was given for the increase in the instruction fee.

He relied on the case of **First American Bank of Kenya Vs Shah and Others E.A.L.R (2002) 1 E.A 64** in which Ringera J (as he then was) held:

> "The High Court was not entitled to upset a taxation merely because, in its opinion, the amount awarded was high and it would not interfere with a Taxing Officer's decision unless the decision was based on an error of principle or the fee awarded was so manifestly excessive as to justify an inference that it was based on an error of principle. *(Steel Construction Petroleum Engineering E.A Limited Vs Uganda Sugar Factory [1970] E.A followed)*. Under the Advocates Remuneration Order, some of the relevant factors to be considered were the nature and importance of the matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any direction by the trial judge.
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> Though the High court had the jurisdiction and discretion to reassess the bill itself *Steel Construction Petroleum Engineering E.A Limited Vs Uganda Sugar Factory [1970] E.A (Supra) and Arthur Vs Nyeri Electricity Underwriters [1961] E.A followed*, the normal practice where the Taxing Officer's decision for reassessment unless the court was satisfied that the error did not materially affect the assessment *(Nanyuki Esso Service Vs Touring and Sports Cabs Ltd [1972] Steel Construction Petroleum Engineering E.A Limited Vs Uganda Sugar Factory [1970] E.A (Supra) and Arthur Vs Nyeri Electricity Underwriters [1961] E.A* followed.
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> Though the issue when an advocate became entitled to an instruction fee was the subject of apparently conflicting appellate decisions, the better position was that the instruction fee was an independent and static item, not affected by the stage a suit had reached (*Joreth Ltd Vs Kigano and Associates [2002] 1 E.A 88 CAK followed, Mayers Vs Hamilton [1975] E.A* referred to.)The full instruction fee to defend a suit was earned the moment a defence was filed and the subsequent progress of the matter was not relevant."

That appears to me with respect to be a proper enunciation of the applicable law relating to the power of the High Court in objection proceedings and the correct position with regard to an instruction fee earned.

In reply Mr. Gatonye submitted that no error of principle was to be found in the Deputy Registrar's Ruling and if so the matter should be remitted to the Taxing Officer.

He relied on **First American Bank of Kenya Vs Shah and Others E.A.L.R (2002) 1 E.A 64** referred to above.

He referred to Paragraph 19 of the Plaint in which a sum of Kshs 50 Million is claimed as actual and aggravated damages. The suit was not simple and involved a contract for supply of goods to the Kenyatta National Hospital in a considerable sum.

He took two points on procedure.

Firstly, that under Rule 11 (2) referred to above the Notice of Objection was filed outside the 14 days time limit and was incompetent.

In response, Mr. Wandabwa concedes that the notice was filed one day late but asked the court to exercise its discretion under Rule 11 (4). However, a Chamber Summons is required for the purpose and l direct the Applicant to file an appropriate application for this purpose. Subject thereto l grant the extension of time asked for.

Mr. Gatonye also submitted that the affidavit in support of the application was sworn by an advocate and as it contained what he considered to be contentious matters, it should be struck out.

He relied on the cases of **East African Foundry Works (K) Ltd Vs Kenya Commercial Bank HCCC NO. 1077 OF 2002** in which Ringera J (as he than was) struck out paragraphs in an affidavit sworn by an advocate which he found contentious and UAP Provincial Insurance Co. Ltd Vs Dover Insurance Agency Ltd HCCC NO 611 of 1999 in which Njagi J stated at page 5 :

> "While agreeing with the sentiments of the learned judge, l also think that should it become

> necessary for an advocate to swear an affidavit in support of a client's application, he may do so provided he confines himself to facts which are not in dispute, such as those touching upon the court record."

I would with respect agree with this statement. There are in practice a number of occasions when it is proper for an advocate to swear an affidavit in a cause and so long as he does not swear to matters which are the res gestae of the matter and contentious it is perfectly proper for him to do so.

In this case l can see nothing contentious in what is deponed to by Mr. Bernard Mwaura Advocate.

Having said that paragraphs 9, 10, 11, 12 and 13 of the affidavit are matters of argument and not required to be sworn to and l therefore strike out these paragraphs and ignore them.

One other matter Mr. Gatonye referred to was the form of the notice to the Taxing Officer which he says is addressed to no one. This was dealt with by Azangalala J in his ruling in the main case dated the 16/12/2004 in which he held that the information in the notice was sufficient to qualify as a valid Notice of Objection.

I now turn to the ruling of the learned Principal Deputy Registrar of the 8/7/2004. She differed with the counsel and found that the relevant provision of the Schedule to the Rules was Schedule VI paragraph 1 (L). In this respect l agree with her entirely. The basic scale fee is therefore not less than Kshs 6,000.

However in considering the value of the subject mater she stated:

> "This was a defamation case involving the Director of Kenyatta National Hospital in his capacity as the Director involving contracts worth Millions of shillings."

This with respect is a misdirection. What the learned Taxing Officer had to ascertain was the value of the work done by the advocate at the time at which he took instructions to file a defence, taking into account the value and the importance of the case, the time spent on researching into facts and law.

In the case of Steel Construction & Petroleum Engineering (E.A) Ltd Vs Uganda Sugar Factory Ltd (1970) E.A p 141 at page 143 Spry JA referred to matters which should not have been taken into account by the taxing officer in the assessment of the instruction fee.

In her ruling at page 17 the taxing Officer stated:

> "I have also perused the other applications on record and affidavit in support and l find that they talk of contracts of millions of Shillings."

Again on page 18 she states:

> "This brief was enormously important and great responsibility was placed on the shoulders of counsel. The issue raised impacted heavily on the parties.
>
> Counsel spent long hours on research and going through the contracts and litigation was important to the Plaintiff as this was public institution involved.
>
> However l find an award of 8 million is on the higher side."

It seems the Taxing Officer was to some extent overawed by the amounts involved in the contracts entered into by the Plaintiffs with Kenyatta National Hospital.

What she should have considered was the nature of the libel and what was necessary for the defendant's counsel to consider in preparing the defence. The written Defence filed and dated the 8/7/2002 was of some 7 paragraphs and very short. True counsel had to consider the contents of the plaint which was five

and a half pages long.

I would rely on the remarks of Spry V.P in the case of **Premchard Raichard Ltd & another Vs Quarry Services of East Africa Ltd and Others (1972) E.A 162**

The essence of the defence was justification and that the article complained of was written in good faith.

In her ruling, the Taxing Officer says she referred to the court file. Although this might be of some assistance in discovering what was done to enable the Defence to be filed, l would recommend to the Taxing Officer the practice in the High Courts of England where the Taxing Master calls for the solicitor's file to see what work he had done. This can be adopted as a precedent where the taxing Officer is in doubt as to what work was done.

Having said that l find that the taxing officer acted on wrong principles and took matters into account which were not relevant to a calculation of the work done.

Bearing in mind that the basic instruction fee should not be less than Kshs 6,000 a quantum leap to Kshs 4 Million seems to be manifestly excessive. I am conscious of the fact that normally this matter should be referred back to the taxing officer. However l do have the power to interfere as the Court of Appeal did in **Premchard Raichard Ltd & another Vs Quarry Services of East Africa Ltd and Others (1972) E.A 162** referred to above.

Taking into account the matters l have referred to herein l consider that an instruction fee of Kshs 500,000 would be a fair reflection of the work done by the Defendant's counsel in that matter.

The Applicant will have the costs.

Dated and Delivered at Nairobi on 17th March 2005

P.J **RANSLEY**
JUDGE